No. 14304

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BERNARD HENRY ASHAUER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLEE.

LAUGHLIN E. WATERS,
United States Attorney,

LOUIS LEE ABBOTT,
Assistant United States Attorney,
Chief of Criminal Division,

MANUEL L. REAL,
HIRAM W. KWAN,
Assistant United States Attorneys,
600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellee.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

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REPLY BRIEF OF APPELLEE.

I.

STATEMENT OF JURISDICTION.

Appellant was indicted by the Federal Grand Jury in and for the Southern District of California on July 22, 1953, under Section 462 of Title 50, Appendix, United States Code, for refusing to submit to induction into the armed forces of the United States. [R. pp. 3-4.][1]

On August 10, 1953, the appellant was arraigned, entered a plea of Not Guilty, and the case was set for trial on August 25, 1953.

On October 26, 1953, trial was begun in the United States District Court for the Southern District of California before the Honorable Harry C. Westover, without

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[1]"R." refers to Transcript of Record.

a jury, and on November 5, 1953, the appellant was found guilty as charged in the indictment. [R. pp. 9-10.]

On November 5, 1953, appellant was sentenced to imprisonment for a period of three years, and judgment was so entered. [R. pp. 9-10.] Appellant appeals from this judgment. [R. p. 11.]

The District Court had jurisdiction of this cause of action under Section 462 of Title 50, Appendix, United States Code, and Section 3231, Title 18, United States Code.

This Court has jurisdiction under Section 1291 of Title 28, United States Code.

II.

STATUTES INVOLVED.

The Indictment in this case was brought under Section 462 of Title 50, Appendix, United States Code, which provides in pertinent part:

> "(a) Any . . . person charged as herein provided with the duty of carrying out any of the provisions of this title [sections 451-470 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under oath in the execution of this title [said sections], or rules, regulations, or directions made pursuant to this title [said section] . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment . . ."

III.

STATEMENT OF THE CASE.

The Indictment charges as follows:

"Indictment—No. 23002-CD (Criminal) [U. S. C., Title 50, App., Section 462—Universal Military Training and Service Act].

"The grand jury charges:

"Defendant BERNARD HENRY ASHAUER, a male person within the class made subject to selective service under the Universal Military Training and Service Act, registered as required by said act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 83, said board being then and there duly created and acting, under the Selective Service System established by said act, in Los Angeles County, California, in the Central Division of the Southern District of California; pursuant to said act and the regulations promulgated thereunder, the defendant was classified in Class 1-A and was notified of said classification and a notice and order by said board was duly given to him to report for induction into the armed forces of the United States of America on December 8, 1952, in Los Angeles County, California, in the division and district aforesaid; and at said time and place the defendant did knowingly fail and neglect to perform a duty required of him under said act and the regulations promulgated thereunder in that he then and there knowingly failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do." [R. pp. 3-4.]

On August 10, 1953, appellant appeared for arraignment and plea, represented by J. B. Tietz, Esq., before the Honorable Harry C. Westover, United States District

Judge, and entered a plea of Not Guilty to the offense charged in the Indictment.

On October 26, 1953, the case was called for trial before the Honorable Harry C. Westover, United States District Judge, without a jury, and on November 5, 1953, the appellant was found guilty as charged in the Indictment. [R. pp. 9-10.]

On November 5, 1953, appellant was sentenced to imprisonment for a period of three years in a penitentiary. [R. pp. 9-10.]

Appellant assigns as error the judgment of conviction on the following grounds:

A. The District Court erred in failing to acquit the appellant as requested at the close of all the evidence.

B. The District Court erred in convicting appellant and entering a judgment of guilty against him.

IV.

STATEMENT OF THE FACTS.

On September 17, 1948, Bernard Henry Ashauer registered under the Selective Service System with Local Board No. 83, North Hollywood, California.

On September 22, 1949, the appellant filed with Local Board No. 83 SSS Form 100, Classification Questionnaire. He stated that he worked approximately 40 hours per week on the production line of General Motors and expected to continue to do so indefinitely. The appellant

signed Series XIV and thus informed the local board that he claimed exemption from military service by reason of conscientious objection to participation in war. He also requested further information and forms.

SSS Form 150, Special Form for Conscientious Objector, was furnished to the appellant and he completed this form and filed it with the local board. The appellant claimed to be conscientiously opposed to participation in war in any form and opposed to participation in noncombatant training or service in the armed forces, by reason of his religious training and belief.

On January 16, 1951, the appellant was classified in Class 4-E, and was reclassified in Class I-A on November 20, 1951.

On November 28, 1951, the appellant requested a personal appearance before the board and was granted such personal appearance on December 4, 1951.

On December 13, 1951, the appellant filed Notice of Appeal from his classification to the Appeal Board.

On November 17, 1951, the Appeal Board classified the appellant in Class 1-A. Form 110, Notice of Classification, was mailed on November 19, 1952, to the appellant.

On November 21, 1952, SSS Form 252, Order to Report for Induction, was mailed to the appellant, ordering him to report for induction on December 8, 1952. The appellant reported for induction but refused to submit to induction into the armed forces of the United States.

V.

ARGUMENT.

POINT ONE.

The Board of Appeals Had Basis in Fact to Classify the Appellant in Class I-A and Its Action Was Neither Arbitrary nor Capricious.

The classification of registrants by Local Boards and Appeal Board is provided by 50 U. S. Code, Appendix, Section 460, which provides in pertinent part:

> ". . .
>
> "(b) The President is authorized—
>
> "(3) to create and establish . . . civilian local boards, civilian appeal boards, . . . Such local boards . . . shall, under the rules and regulations prescribed by the President, have the power . . . to hear and determine . . . all questions or claims, with respect to inclusion or exemption or deferment from, training and service under this title (said sections), of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe . . . The decision of such appeal boards shall be final in cases before them on appeal unless modified or changed by the President . . ."

The appeal board has jurisdiction, thus, to hear appeals and classify anew.

32 C. F. R., Sec. 1626.26—Decision of Appeal Board—provides:

> "(a) The appeal board shall classify the registrant, giving consideration to the various classes *in*

the same manner in which the local board gives consideration thereto when it classifies a registrant, except that an appeal board may not place a registrant in Class IV-F because of physical or mental disability unless the registrant has been found by the local board or the armed forces to be disqualified for any military service because of physical or mental disability.

"(b) Such classification of the registrant shall be *final,* except where an appeal to the President is taken: Provided, That this shall not be construed as prohibiting a local board from changing the classification of a registrant in a proper cause under the provisions of Part 1625 of this chapter." (Emphasis added.)

The classifications of the local boards and later the appeal boards made in conformity with the regulations are *final* even though erroneous. The question of jurisdiction arises only if there is no basis in fact for the classification.

Estep v. United States, 327 U. S. 114;

Tyrrell v. United States, 200 F. 2d 8 (9th Cir.);

United States v. Del Santo, 205 F. 2d 429 (7th Cir.).

The statute granting the exemption reads as follows:

"Title 50, App., United States Code, Section 456—Deferments and exemptions from training and service.

. . . . . .

"(j) Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training

and belief, is conscientiously opposed to participation in war in any form. . . ."

Selective Service Regulations, Section 1622.11 [32 C. F. R. 1622.11] provides:

"§1622.11—Class I-A-O—*Conscientious objector available for non-combatant military service only.*

"(a) In Class I-A-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to combatant training and service in the armed forces.

"(b) Section 6(j) of Title I of the Universal Military Training and Service Act, as amended, provides in part as follows:

" 'Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal code.' "

Selective Service Regulations, Section 1622.14 [32 C. F. R. 1622.14] provides:

"§1622.14—Class I-O—*Conscientious objector available for civilian work contributing to the maintenance of the national health, safety, or interest.*

"(a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to both combatant and non-combatant training and service in the armed forces."

An exemption from military service is a privilege granted by Congress. It is not a right guaranteed to any person, and should be strictly construed against a claimant. Unless the claimant establishes his eligibility by clear and convincing proof, he should not be granted a conscientious objector exemption.

United States v. Schoebel, 201 F. 2d 31 (7th Cir.);
Davis v. United States, 203 F. 2d 853 (8th Cir.).

Thus, such a registrant must satisfy the Selective Service Board as to the validity of his claim for exemption in the following particulars:

(1) He must be conscientiously opposed to war in any form; and

(2) This opposition must be by reason of the registrant's religious belief and religious training; and

(3) The registrant must make a timely, sincere, and good faith claim; and

(4) The registrant must be conscientiously opposed to combatant and/or noncombatant training and service.

These tests recognize that conscientious objection claims concern a state of mind of an individual. It is an intangible, and as such difficult to ascertain objectively, as compared with a ministerial claim (Class 4-D).

In *United States v. Simmons,* Case No. 11011, 7th Cir., June 15, 1954, ... F. 2d ....., the court states:

> ". . . thus, a distinction must be drawn, we believe, between a claim of ministerial status and a claim of conscientious objection status as to susceptibility of proof. Whether a registrant is a minister in the statutory sense, having as a principal vocation the leadership of and ministering to the followers

of his creed, is a factual question susceptible of exact proof by evidence as to his status within the sect and his daily activities. No search of his conscience is required. Even though the only tenet of his cult be a belief in war and bloodshed, he still would be exempt from military service if he were, in fact, a minister of religion. Is he affiliated with a religious sect? Does he, as his vocation, represent that sect as a leader ministering to its followers? These questions are determinative and subject to exact proof or disproof.

"The conscientious objector claim admits of no such exact proof. Probing a man's conscience is, at best, a speculative venture. No one, not even his closest friends and associates, can testify to a certainty as to what he believes and feels. These at most, can only express their opinions as to his sincerity. The best evidence on this question may well be, not the man's statements or those of other witnesses, but his credibility and demeanor in a personal appearance before the fact finding agency. We cannot presume that a particular classification is based on the board's disbelief of the registrant, but, just as surely, the statutory scheme will not permit us to burden the board with the impossible task of rebutting a presumption of the validity of every claim based ofttimes on little more than the registrant's statement that he is conscientiously opposed to participation in war. When the record discloses any evidence of whatever nature which is incompatible with the claim of exemption we may not inquire further as to the correctness of the board's order."

Accord: *United States v. Sicurella,* Case No. 11012, 7th Cir., June 15, 1954, ... F. 2d .....

Appellant was granted a personal appearance before the local board on December 4, 1951, a hearing before hearing officer Nathan O. Freedman on August 25, 1952, and the appellant testified on his own behalf before Judge Westover on several occasions in the course of the trial in the District Court. [R. pp. 25-40, 62-71.]

On each of the occasions above, appellant's claim for a conscientious objection exemption was denied.

Furthermore, judicial review of the administrative action was accorded to the appellant in the District Court trial. Once again, the trier of the facts was able to observe the demeanor, sincerity and credibility of the witness-appellant when the appellant took the witness stand on his own behalf. [R. pp. 25-40, 62-71.] A reading of the transcript of record indicates that the appellant did not pursue his claim in good faith. His testimony lacked truthfulness in that the appellant's accusations of bias and prejudice on the part of the local board were determined to be unfounded. [R. p. 26.]

> "Q. Tell me this, in discussing the file, that is, in discussing your file, tell me this, did you try to discuss the contents of your file with them and point out certain things to them? A. Yes, I did.
>
> Q. Did they let you do it? A. No, they didn't."

On cross-examination, Transcript of Record, page 31:

> "Q. Did they give you an opportunity to expound your views? A. Yes, to a certain extent they did."

And on page 33:

> "Q. Isn't it a fact that at that hearing you had an opportunity to present additional evidence? A. All I could present was three pieces of paper that, you know, that people would write concerning my

behavior in my company, and so forth, and that's all they would take.

Q. Weren't there four letters, one from Mr. Floyd Kite, Jr.? A. Yes."

* * * * * * * *

[R. p. 35]:

"Q. Mr. Ashauer, I have got this photostatic copy of your file. Let me show you pages 20 and 21. This appears to be a pamphlet of the Jehovah's Witness sect, is that correct? A. That is correct.

Q. On page 21, here is another pamphlet, known as The Watchtower. A. That's right.

* * * * * * * *

The Witness: Well, as I recollect now, they were willing to take this particular magazine, too, because it is a thin magazine and it doesn't take up too much space, and it is Why Jehovah's Witnesses are not Pacifists. They were willing to take this one here, because it is a small booklet. The others they refused to take because they took up too much space in the file.

Q. (By Mr. Mitsumori): How many pages were the other pamphlets you had submitted? A. Oh, maybe 30 pages in the book, just a small one, and the other might have been 18 or 20.

Q. Contrary to the statement you gave on direct examination, they did give you an opportunity to present these two pamphlets? A. Well, after I told them I was going to call up or I was going to write, and then when they heard that, they figured they'd better take some, so they did take some, those two pamphlets, or maybe three or four. I am not positive what it was."

The appellant was inconsistent in his beliefs in that, on page 15 of Government's Exhibit No. 1, he stated that he would use force when his self-defense was involved. However, on cross-examination, the appellant stated that he would not participate or defend his own sect even if theocratic warfare were involved. Transcript of Record, page 37, states:

> "Q. In other words, if, for example, if I may put it this way to you, if Communists attempted to destroy Jehovah's Witnesses, would you take arms to combat them, to combat such a force as Communism to preserve the state of Jehovah? A. No, sir, I wouldn't. The only time you could do that would be, if you know the Bible back there in the time when the Israelites were the chosen people, they had a right to defend themselves because they were ruled by God, theocratic war.
>
> Q. If God chose that Jehovah's Witnesses should participate in theocratic war, would you do so? A. I don't know exactly, no, because I wouldn't know when there was—
>
> Q. Assuming that He did, God did, command theocratic war? A. I mean I don't understand what you mean there.
>
> Q. I mean if in the event the Jehovah's people were [31] attacked, an evil force attempted to destroy Jehovah's people, would you, as a Jehovah's Witness, take arms to preserve your people and your belief that you do believe in? A. Well, I would have to say no, because it was at the time during the last war, they were all in prison, too, under Hitler, and the people refused to take up arms, so, therefore, they were put into concentration camps.

Q. But during the last war Jehovah's people were not being attacked by Hitler. A. Not necessarily like that, but it is like where all they had to do was sign a piece of paper saying he was the higher power and they refused to do that, because they know there is only one power.

Q. It is your belief you would not participate in any way, in any form, directly, or indirectly, is it not? A. That is correct.

Q. Even to the extent of participating in the war effort in a civilian capacity, working in defense industry? A. That is true because I consider if you are working in a defnse plant, you are making bullets, and so forth, provided for men to use, but I would be willing to do some other kind of work?

Q. Were you aware General Motors is one of the largest wartime contract holders? A. Yes, sir, but when I was working there, we were [32] making cars for personal use for people. They were not making any kind of war material.

Mr. Mitsumori: No further questions." [R. p. 38.]

POINT TWO.

The Advisory Recommendation by the Department of Justice Was Neither Arbitrary nor Capricious and Was Based on Sound, Relevant and Material Grounds.

This point is similar to Appellant's Point One. Therefore, it is respectfully requested that the Appellee's Argument in answer to Point One be made applicable also to Point Two.

The duty to classify registrants, to grant or deny exemptions to conscientious objectors is vested in the draft

boards, local and appellate and not upon the Department of Justice.

50 U. S. C., App., Sec. 460.

The Department of Justice Hearing is advisory in nature; the appeal board is not bound to follow the recommendation of the Department of Justice.

United States v. Nugent, 346 U. S. 1;

Imboden v. United States, 194 F. 2d 508;

Title 50, U. S. C., App., Sec. 456(j);

Title 32, C. F. R. (1951 Rev. Ed.), Sec. 1626.25.

In *United States v. Nugent* (*supra*), the Supreme Court stated the requirements for the Department of Justice inquiry as follows, at page 6:

> "We think that the Department of Justice satisfies its duties under §6(j) when it accords a fair opportunity to the registrant to speak his piece before an impartial hearing officer; when it permits him to produce all relevant evidence in his own behalf and at the same time supplies him with a fair résumé of any adverse evidence in the investigator's report . . ."

(Continuing on p. 9):

> "Accordingly the standards of procedure to which the Department must adhere are simply standards which will enable it to discharge its duty to forward sound advice, as expeditiously as possible, to the appeal board."

The Government contends that while due process does not require that the standard denoted in the *Nugent* case

be met, the Government has exceeded the standard of the the *Nugent* case here.

United States v. Simmons, supra.

Appellant states in his opening brief, on page 9, that:

> "The sole and only reason for the recommended denial of the conscientious objector claim was that the appellant believed in self-defense and theocratic warfare notwithstanding his opposition to the participation in war between the nations of this world."

A reading of the advisory recommendation of the Department of justice indicates that the appellant is in error, for on page 40 of Government's Exhibit No. 1, the basis for the advisory recommendation is the entire file and record:

> "After consideration of the entire file and record, the Department of Justice finds that the registrant's objections to combatant and noncombatant service are not sustained."

The record includes the appraisal of the good faith, demeanor and sincerity of appellant's conscientious objections. These are not artificial, irrelevant and immaterial elements, but, in fact are the essence of what constitutes a true conscientious objector.

United States v. Simmons, supra.

VI.
CONCLUSIONS.

The questions raised in this appeal fall within the limitations of judicial review of Selective Service Board action as stated in *Cox v. United States,* 332 U. S. 442. The trial court found that there was no arbitrary or capricious action by the Selective Service Boards.

There was no error of law in the rulings of the District Court. Therefore, the conviction should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

LOUIS LEE ABBOTT,
Assistant United States Attorney,
Chief of Criminal Division,

MANUEL L. REAL,
HIRAM W. KWAN,
Assistant United States Attorneys,

Attorneys for Appellee.